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CHARLES DICKENS' NOVELS IN THE COURTS

DOUGLAS E. ABRAMS¹

IN SEVERAL RECENT “WRITING IT RIGHT” ARTICLES, I HAVE DESCRIBED HOW FEDERAL AND STATE JUDGES OFTEN ENHANCE THEIR WRITTEN OPINIONS WITH REFERENCES TO WELL-KNOWN CULTURAL MARKERS. THESE REFERENCES DO NOT DECIDE ANY CLAIM OR DEFENSE, BUT JUDGES REMAIN CONFIDENT THAT THE REFERENCES – CITATIONS, QUOTATIONS, OR BOTH – RESONATE WITH READERS.

These “Writing It Right” articles share a common theme: The wide array of judicial references invites advocates, where relevant and appropriate, to follow the courts’ lead to enhance their briefs and other written submissions with references to well-known cultural markers.

The wide array of cultural markers

The array of cultural markers referenced in written federal and state judicial opinions remains wide indeed. Some of my early “Writing It Right” articles profiled opinions that referenced terminologies, rules, and traditions of baseball,² football,³ basketball, golf, hockey,⁴ and other participation and spectator sports that help shape American life. Later articles profiled judicial references to classic television shows and movies,⁵ as well as well-known children’s stories, fairy tales, and Aesop’s Fables.⁶ I have also described judicial references to the plays of William Shakespeare.⁷

This article examines written judicial opinions that contain references to novels by Charles Dickens (1812-1870), the British novelist and social critic who is widely regarded as one of the greatest writers of the Victorian Age. Americans today still read Dickens’ best-known novels, and the U.S.

Supreme Court and the lower federal and state courts have cited and quoted from them.

Charles Dickens in the U.S. Supreme Court

“*Bleak House*” (1852-53)

Dickens’ novel, “Bleak House,” features the fictional probate case of *Jarndyce and Jarndyce*, in which the parties in the English Court of Chancery fought one another for decades until the testator’s large estate was depleted and the only ultimate winners were the lawyers who collected their fees all the while. More than a century and a half after publication of “Bleak House,” *Jarndyce* remains the prime literary example of civil litigation whose wasteful duration outlives the best interests of litigants who have compromised their rationality and clear thinking.

* * *

Fast-forward to recent times. In 1994, Vickie Lynn Marshall – known as Anna Nicole Smith by the public – married billionaire J. Howard Marshall II, who died the following year. J. Howard Marshall II was generous with gifts and money throughout the couple’s courtship and brief marriage, but he did not name her in his will.

In 1996, Vickie filed suit in Texas probate court against E. Pierce Marshall, the testator’s son and the ultimate beneficiary under his father’s estate plan. Her claim was for half of

the vast estate. On various claims and counterclaims, the litigation worked its way through federal and state courts in three states before it reached the U.S. Supreme Court in 2006. In *Marshall v. Marshall*, the Court held unanimously that the federal district court properly asserted jurisdiction over Vickie’s counterclaim against Pierce because the counterclaim did not fall within the scope of the probate exception to that jurisdiction.⁸

Legal proceedings, including Vickie’s bankruptcy declaration, survived the U.S. Supreme Court decision. By the time the Court decided *Stern v. Marshall* in 2011, another appeal in the “long-running dispute,”⁹ Vickie and Pierce had both died and their respective executors of estates continued litigating in their places. *Stern* held, 5-4, that as an Article I judge, the bankruptcy court judge did not hold constitutional authority to decide a counterclaim by Vickie’s estate against Pierce’s estate.¹⁰

Writing for *Stern*’s majority in 2011, Chief Justice John G.



Douglas E. Abrams

Roberts Jr. opened his opinion by citing and quoting from the “Bleak House” description of the interminable *Jarndyce* probate proceeding:

This “suit has, in course of time, become so complicated, that ... no two ... lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause: innumerable young people have married into it;” and, sadly, the original parties “have died out of it.” A “long procession of [judges] has come in and gone out” during that time, and still the suit “drags its weary length before the Court.”¹¹

“Those words were not written about this case,” Chief Justice Roberts explained, “but they could have been.”¹² Commenting on the diminished value of J. Howard Marshall’s estate by 2011, the Los Angeles Times aptly called the Marshall saga “a Dickensian legal struggle.”¹³

“*A Tale of Two Cities*” (1859)

Dickens returned to the pages of the U.S. Reports in 2015, in *Davis v. Ayala*.¹⁴ During jury selection in his murder trial in California state court, defendant Hector Ayala objected that seven of the prosecution’s peremptory strikes were race-based in violation of *Batson v. Kentucky*.¹⁵ To avoid disclosure of trial strategy, the trial judge permitted the prosecution to respond to the objections outside the defense’s presence. The judge found that all seven challenged strikes were race-neutral, and the trial proceeded.

After California state courts affirmed the murder conviction and death sentence, Ayala sought federal habeas corpus relief. His claim was that the trial court unconstitutionally excluded the defense from part of the *Batson* hearing. When the federal habeas appeal reached the U.S. Supreme Court, the Court held, 5-4, that any constitutional error arising from the ex parte *Batson* hearing was harmless and left the conviction and capital sentence undisturbed.¹⁶

Associate Justice Anthony M. Kennedy’s *Ayala* concurrence discussed a matter that surfaced during oral argument. The concurrence reported that since being sentenced to death in 1989, the prisoner had spent most of the next 25 years in solitary confinement, likely “in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone.”¹⁷

Justice Kennedy cautioned that “[y]ears on end of near-total isolation exact a terrible price.”¹⁸ (In congressional testimony earlier in 2015, he told the lawmakers that prolonged solitary confinement in prison “literally drives men mad.”¹⁹)

Justice Kennedy’s *Ayala* concurrence helped give madness a human face with a vignette from Charles Dickens’ historical novel, “*A Tale of Two Cities*,” which took place in London and Paris before and throughout the French Revolution. “In literature,” Justice Kennedy wrote, “Charles Dickens recounted the toil of Dr. Manette, whose 18 years of isolation ... caused him, even years after his release, to lapse in and out of a mindless state with almost no awareness or appreciation

for time or his surroundings ... And even Manette, while imprisoned, had a work bench and tools to make shoes, a type of diversion no doubt denied many of today’s inmates.”²⁰

Charles Dickens in the lower courts

The Dickens novels most widely cited and quoted by the lower federal and state courts are “Bleak House”²¹ and “*Oliver Twist*.”²² This article closes with a recent lower court decision that cited and quoted from the latter.

“*Oliver Twist*” (1837-39)

“*Oliver Twist*,” one of Dickens’ most enduring novels, tells the story of a poor orphan boy who met persistent setbacks from his poverty. Mr. Bumble was a cruel, irascible sort who supervised the austere orphanage in which Oliver was raised. When Bumble learned that husbands bore legal responsibility for their wives’ conduct, his retort remains one of the most often quoted lines in Dickens’ novels. “If the law supposes that,” he said, “the law is a ass – a idiot.”²³


* * *

In 2015’s *Walton v. State*, the non-indigent defendant was convicted in Georgia state court of speeding.²⁴ The trial court denied her motion to require the official court reporter to transcribe all pre-trial and jury trial matters and to provide her with a free transcript that she contended the law required.²⁵

The Georgia Court of Appeals affirmed the trial court’s denial. The panel noted that the defendant’s contention, “if accepted, would shift the cost of transcripts from non-indigent criminal defendants to the general public. If that is the law, to quote Charles Dickens’ Mr. Bumble, ‘the law is a ass – a idiot.’ But that is not the law.”²⁶

The *Walton* panel held that the applicable statute entitles a non-indigent defendant to a transcript only when the defendant pays for it.²⁷

Conclusion

“Dull briefs are a real disappointment,” said William A. Holohan, former chief justice of the Supreme Court of Arizona. “The law is dynamic. It is about human conduct. There is nothing dull about it ... There is no reason that a brief shouldn’t be good literature.”²⁸ 

Endnotes

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 22 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded more than 40,000 times worldwide (in 153 countries). His latest book is “Effective Legal Writing: A Guide for Students and Practitioners” (West Academic 2d ed. 2021).

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2 Douglas E. Abrams, *References to Baseball In Judicial Opinions and Written Advocacy*, 72 J. Mo. Bar 268 (Sept.-Oct. 2016).

3 Douglas E. Abrams, *References to Football In Judicial Opinions and Written Advocacy*, 73 J. Mo. Bar 34 (Jan.-Feb. 2017).

4 Douglas E. Abrams, *References to Spring’s Championship Sports In Judicial Opinions and Written Advocacy*, 73 J. Mo. Bar 168 (May-June 2017).

5 Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 25 (Jan.-Feb. 2019); Douglas E. Abrams, *References to Television Shows In Judicial Opinions and Written Advocacy (Part 2)*, 75 J. Mo. Bar 85 (Mar.-Apr. 2019); Douglas E. Abrams, *References*

to *Movies In Judicial Opinions and Written Advocacy (Part 1)*, 75 J. Mo. Bar 222 (Sept.-Oct. 2019); Douglas E. Abrams, *References to Movies In Judicial Opinions and Written Advocacy (Part 2)*, 75 J. Mo. Bar 297 (Nov.-Dec. 2019).

6 Douglas E. Abrams, *References to Children's Stories and Fairy Tales In Judicial Opinions and Written Advocacy*, 76 J. Mo. Bar 212 (Sept.-Oct. 2020); Douglas E. Abrams, *References to Aesop's Fables In Judicial Opinions and Written Advocacy*, 77 J. Mo. Bar 24 (Jan.-Feb. 2021).

7 Douglas E. Abrams, *Shakespeare In the Courts*, 77 J. Mo. Bar 132 (May-June 2021).

8 547 U.S. 293, 300 (2006). For earlier U.S. Supreme Court decisions referencing Dickens, see *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 n.19 (1994) (citing "Bleak House" and *Jarndyce and Jarndyce*); *Application of Gault*, 387 U.S. 1, 79 (1967) (Stewart, J., dissenting) ("In the last 70 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society.").

9 *Stern v. Marshall*, 564 U.S. 462, 468 (2011).

10 *Id.* at 469.

11 Charles Dickens, *Bleak House*, in 1 WORKS OF CHARLES DICKENS 4-5 (1891), quoted at *Stern v. Marshall*, *supra* note 9 at 468.

12 *Stern v. Marshall*, *supra* note 9 at 468.

13 David G. Savage, *Supreme Court rejects Anna Nicole Smith case*, L.A. TIMES (June 24, 2011), <https://www.latimes.com/archives/la-xpm-2011-jun-24-la-na-court-anna-nicole-20110624-story.html>.

14 576 U.S. 257 (2015).

15 476 U.S. 79 (1986).

16 576 U.S. at 260.

17 *Id.* at 286-87 (Kennedy, J., concurring).

18 *Id.* at 289 (Kennedy, J., concurring).

19 The Editorial Board, *Justice Kennedy's Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), <https://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html>.

20 576 U.S. at 287 (Kennedy, J., concurring).

21 Decisions citing and quoting from "Bleak House" include *Doermer v. Oxford Financial Group, Ltd.*, 884 F.3d 643, 649 (7th Cir. 2018); *Hanggi v. Holder*, 563 F.3d 378, 384 (8th Cir. 2009) (Bright, J., concurring); *VirnetX Inc. v. Apple Inc.*, 2021 WL 1941740, at *8 (E.D. Tex. Jan. 15, 2021); *Jeranian v. Dermenjian*, 2019 WL 6117991, at *10 (D.R.I. Nov. 15, 2019); *Seils v. Rochester City School District*, 192 F. Supp.2d 100, 104 (W.D.N.Y. 2002), *aff'd*, 99 Fed. Appx. 350 (2d Cir. 2004); *Figi Graphics, Inc. v. Estate of Edwards*, 1997 WL 567792 (D. Kan. Aug. 26, 1997); *In re Trust No. T-1 of Trimble*, 826 N.W.2d 474, 492 (Iowa 2013); *Lieberman v. Mossbrook*, 208 P.3d 1296, 1310 n.4 (Wyo. 2009); *Nardone v. Ritacco*, 936 A.2d 200, 202 (R.I. 2007); *In re Estate of Silsby*, 914 A.2d 703, 708 n.5 (Maine Sup. J. Ct. 2006); *Hercules, Inc. v. Utah State Tax Com'n*, 974 P.2d 286, 288 (Utah 1999); *Fort Worth Independent School District v. Palazzolo*, 2019 WL 2454866, at *1 n.1 (Tex. Ct. App. June 13, 2019); *Gardella v. Alexander*, 2004 WL 2943255 (Cal. Ct. App. Dec. 21, 2004); *Cadle Co. v. D'Addario*, 2010 WL 1376701, at *6 (Conn. Super. Ct. Mar. 1, 2010).

22 Decisions citing and quoting from "Oliver Twist" include *Community Television Systems, Inc. v. Caruso*, 284 F.3d 430, 436 n.7 (2d Cir. 2002); *U.S. v. Merimord*, 2015 WL 6457166, at *4 (W.D.N.C. 2015); *U.S. v. Ibang*, 454 F. Supp. 2d 532, 543 (E.D. Va. 2006), *vacated on other grounds and remanded*, 271 Fed. Appx. 298 (4th Cir. 2008); *Sadowski v. Gudmundsson*, 206 F.R.D. 25, 27 (D.D.C. 2002); *McDowell v. Citibank*, 734 N.W.2d 1, 13 (S.D. 2007); *Donahoe v. Donahoe*, 632 S.E.2d 42, 44 (W. Va. 2006); *State v. Boylen*, 2000 WL 1719917 (Ohio Ct. App. Nov. 13, 2000); *White v. Medical Protective Co.*, 2013 WL 10545388 (Pa. Ct. Common Pleas Aug. 27, 2013).

23 CHARLES DICKENS, *OLIVER TWIST* 277 (1867 ed.).

24 334 Ga. App 265 (2015).

25 *Id.* at 680-81.

26 *Id.* at 681.

27 *Id.*

28 Mark Rust, *Mistakes to Avoid on Appeal*, 74 A.B.A. J. 78, 79 (Sept. 1988).



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